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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

~~GELDERMANN, INC., and~~
BOARD OF TRADE OF THE CITY OF CHICAGO,

Petitioners,

vs.

COMMODITY FUTURES TRADING COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SCOTT E. EARLY *
PAMELA KLEIN-KURLAND
JOHN C. LEGUTKI
WILLIAM CULLEN
141 West Jackson Boulevard
Chicago, Illinois 60604
(312) 435-3500

Counsel for Petitioner
Board of Trade
of the City of Chicago

March 21, 1988

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred by inferring a Congressional intent to establish compulsory arbitration of common law claims, as mandated by Commodity Futures Trading Commission Regulation 7.201, based upon express legislative inaction at a time when Congress had full knowledge of the federal district court decision declaring Regulation 7.201 unconstitutional and could have unequivocally sanctioned the agency's construction but expressly did not do so?

2. Whether mere membership in a self regulatory organization whose rules expressly notify members that compulsory arbitration by non-members has been declared unconstitutional may rise to the level of the clear, knowing and intentional waiver of constitutional rights required by this Court?

3. Whether requiring arbitration of members' common law controversies with non-members violates the jury trial guarantees of the Seventh Amendment of the United States Constitution?

4. Whether the Court of Appeals erred in sanctioning Congressional authorization for the adjudication of Article III matters by a non-Article III forum, to the detriment of the institutional integrity of the courts and the separation of powers between the branches of government?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceeding below were the Petitioners Board of Trade of the City of Chicago and Geldermann, Inc., and the Respondent Commodity Futures Trading Commission. Geldermann, Inc. will be filing a Petition for Writ of Certiorari on its own behalf.

Petitioner Board of Trade of the City of Chicago is a voluntary membership association created by special act of the legislature of the State of Illinois in 1859. The Board of Trade has no parent companies. The Board of Trade's affiliates are the MidAmerica Commodity Exchange and the Chicago Rice and Cotton Exchange. C-B-T Corporation is a wholly-owned subsidiary of the Board of Trade.

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COMMODITY FUTURES TRADING COMMISSION,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner Board of Trade of the City of Chicago respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered on December 22, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 836 F.2d 310, and is reprinted in the appendix hereto, p. 1, *infra*.*

* References to the appendix in this petition will be indicated as follows: (App. p. ____, *infra*).

The memorandum opinion and order of the United States District Court for the Northern District of Illinois (Holdermann, D.J.) has not been reported. It is reprinted in the appendix hereto, p. 27, *infra*.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. §1331, Geldermann, Inc. brought this suit in the federal court for the Northern District of Illinois against the Petitioner and Respondent. On December 30, 1986, the District Court granted Geldermann's motion for summary judgment against the Respondent. (App. p. 27, *infra*).

The Respondent appealed to the Seventh Circuit. Pursuant to Rule 24 of the Federal Rules of Civil Procedure, 28 U.S.C. Rule 24 (F.R.Civ.P.), the Petitioner Board of Trade of the City of Chicago intervened as an appellee. The Seventh Circuit, on December 22, 1987, entered a judgment and opinion reversing the District Court's order and holding that the Commodity Exchange Act, 7 U.S.C. §1 *et seq.*, mandates submission to customer-initiated arbitration without violating Article III of the Constitution or implicating the Seventh Amendment (App. p. 1, *infra*). No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. §1254(1).

STATUTE, REGULATION AND RULE INVOLVED

7 U.S.C. §7a(11), Duties of contract markets

Each contract market shall provide a fair and equitable procedure through arbitration or otherwise (such as by delegation to a registered futures association having rules providing for such procedures) for the settlement of customers' claims and grievances against any member or employee thereof: Provided, That (i) the use of such procedure by a customer shall be voluntary and (ii) the term "customer" as used in this paragraph shall not include another member of the contract market.

17 C.F.R. §7.201 and Board of Trade of the City of Chicago Rule 620.01(B), Customer Claims and Grievances

The Arbitration Committee and Mixed Panels constituted pursuant to Regulation 620.02 have jurisdiction to arbitrate all Customers' Claims and Grievances against any member or employee thereof which have arisen prior to the date the customer's claim is asserted. If the customer elects to initiate an arbitration proceeding of any customer claim or grievance, the member shall submit to arbitration in accordance with these Arbitration Rules and Regulations. The arbitration shall be initiated by delivery to the Administrator of (a) a Statement of Claim and a "Chicago Board of Trade Arbitration Submission Agreement for Customer's Claims and Grievances" signed by the customer or (b) a Statement of Claim and another arbitration agreement between the parties, which agreement conforms in all respects with any applicable requirements prescribed by the Commodity Futures Trading Commission. The refusal of any member or employee to sign the "Chicago Board of Trade Arbitration Submission Agreement for Customer's Claims and Grievances" shall not deprive the Arbitration Committee or a Mixed Panel constituted

pursuant to Regulation 620.02 of jurisdiction to arbitrate customers' claims under these Arbitration Rules and Regulations. The Committee and Mixed Panels have jurisdiction to arbitrate a counterclaim asserted in such an arbitration, but only if it arises out of the transaction or occurrence that is the subject of the customer's claim or grievance and does not require for adjudication the presence of essential witnesses, parties or third persons over whom the Association does not have jurisdiction. Other counterclaims are subject to arbitration by the Committee, or a Mixed Panel, only if the customer agrees to the submission after the counterclaim has arisen.

STATEMENT OF THE CASE

Geldermann, Inc. ("Geldermann") and the Board of Trade of the City of Chicago ("Board of Trade" or "Exchange") are challenging here the constitutionality of Commodity Futures Trading Commission ("CFTC" or "Commission") Regulation 7.201, 17 C.F.R. §7.201. A necessary predicate to understanding this current action between the parties is an appreciation of past disputes between the Exchange and the Commission over the legality of Regulation 7.201. Therefore, the circumstances leading to the institution of the instant case will be put in their historical context initially, and the discussion of Geldermann's involvement will follow.

The CFTC is an independent federal agency established pursuant to the Commodity Exchange Act ("CEA" or "Act"), 7 U.S.C. §1 *et seq.*, to provide federal regulatory oversight to the Board of Trade and other self-regulatory commodity futures exchanges, also known as contract markets. The Commission is empowered to institute rules

and regulations to effectuate the purposes of the Act, 7 U.S.C. §12a(5), and to alter the rules of a contract market, 7 U.S.C. §12a(7).

Section 5a(11) of the Act, 7 U.S.C. §7a(11), requires the Exchange to:

> . . . provide a fair and equitable procedure through arbitration or otherwise (such as by delegation to a registered futures association having rules providing for such procedures) for the settlement of customers' claims and grievances against any member or employee thereof: Provided, that (i) the use of such procedure by a customer shall be voluntary and (ii) the term "customer" as used in this paragraph shall not include another member of the contract market. . .

In compliance with §5a(11), the Board of Trade proposed Rule 620.01(B) calling for voluntary arbitration by its members of customer-initiated claims. The CFTC evolved a contrary interpretation of §5a(11) and adopted Regulation 7.201 to rewrite Exchange Rule 620.01(B), effectively requiring compulsory arbitration of customer claims against Exchange members. (The text of Regulation 7.201 and Rule 620.01(B) is reprinted at p. 3, *supra.*) The Exchange brought suit against the Commission to void Regulation 7.201 as well as its own Rule 620.01(B), in the case of *Board of Trade of the City of Chicago v. Commodity Futures Trading Commission*, No. 81 C 7175, slip op. (N.D. Ill. April 23, 1982) (hereinafter "*CBT v. CFTC*").

In *CBT v. CFTC*, the Board of Trade claimed that the Commission acted arbitrarily in promulgating Regulation 7.201 because the Commission wrongly believed that Section 5a(11) of the CEA required compulsory arbitration. The Exchange also contended that mandatory arbitration deprived Exchange members of their Seventh Amendment right to a jury trial. The Commission defended the

suit by claiming that the Exchange lacked standing, that the lawsuit did not present "ripe" issues, and that the Seventh Amendment did not apply to claims subject to compulsory arbitration.

The District Court in *CBT v. CFTC* entered judgment for the Board of Trade and permanently enjoined the CFTC from enforcing Commission Rule 7.201 by holding that the rule violated the Seventh Amendment in compelling Exchange members to arbitrate common law legal claims. The Court further found that the Act did not require the CFTC to adopt a mandatory arbitration rule.

On appeal, the Seventh Circuit reversed solely on grounds of ripeness by holding that neither the Board of Trade nor its members had suffered harm from the CFTC regulation and that the case lacked a "specific factual context." *CBT v. CFTC*, 704 F.2d 929 (7th Cir. 1983). Furthermore, the Court of Appeals wrote that the CFTC might "choose not to apply its rule" when presented with a particular customer demand for arbitration and concluded that it could not decide, in the case before it, whether the CFTC regulation violated the Seventh Amendment.

Since the Court of Appeals' decision in *CBT v. CFTC*, the Board of Trade's rulebook has contained the following footnote to Rule 620.01(B):

> The legality of Rule 7.201 and thus the obligation of Board of Trade members to arbitrate customers' claims and grievances, has been the subject of litigation between the Board of Trade and the CFTC. In 1982, the United States District Court for the Northern District of Illinois declared the Rule invalid, holding that CFTC Rule 7.201 is an unconstitutional denial of the right to a jury trial. However, on April 5, 1983, the Seventh Circuit Court of Appeals held that the case was not yet "ripe" for adjudication. While the Court did not rule on the merits, the Court went

> on to say: "Moreover, the Board need not flout the rule in order to challenge its validity. A member or employee ordered by the Board or the Commission to arbitrate under Rule 7.201 could simply bring a suit to enjoin arbitration or to enjoin enforcement of an arbitration award against him on the ground that the Commission's rule requiring arbitration is invalid.

This history is a necessary predicate to the current dispute.

Geldermann is a commodity futures brokerage firm registered with the CFTC as a Futures Commission Merchant ("FCM") under §4d(1) of the CEA, 7 U.S.C. §6d(1), and a member of the Board of Trade. As a registered FCM, Geldermann may solicit and accept customer orders for the purchase or sale of commodity futures and options.

FSI Futures, Inc. ("FSI") was a Geldermann customer and regularly traded commodity futures on the Board of Trade through its account with Geldermann. In April, 1985, FSI asserted a claim in arbitration against Geldermann for Geldermann's failure to fill a purchase order. Geldermann elected to arbitrate the claim which was heard before a Board of Trade arbitration panel. The panel awarded FSI $54,718. Shortly after the arbitration Geldermann terminated its relationship with its customer with the request that FSI immediately transfer all of its open positions to another firm. FSI objected to the commissions charged by Geldermann upon the transfer of FSI's open positions and filed another exchange arbitration claim against Geldermann for money damages, plus interest, under the provisions of CFTC Regulation 7.201 and Exchange Rule 620.01(B).

Geldermann responded to FSI's arbitration claim by instituting this action against the CFTC, the Board of Trade and FSI, in the federal court for the Northern District of Illinois, pursuant to 28 U.S.C. §1331. Geldermann asserted that FSI's claims were common law actions and,

therefore, they should be tried in the District Court by a jury pursuant to Article III of the United States Constitution and the Seventh Amendment.

The District Court ruled in Geldermann's favor and held that Commission Regulation 7.201 and Board of Trade Rule 620.01(B) violated Geldermann's Seventh Amendment right to a trial by jury. The District Court also permanently enjoined and restrained the CFTC from requiring Geldermann to arbitrate FSI's claims (App. p. 39, *infra*). Although it acknowledged the strength of Geldermann's Article III challenge, the court did not base its decision on this argument (App. p. 37, *infra*).

Invoking the jurisdiction of the United States Court of Appeals for the Seventh Circuit under 28 U.S.C. §1291, the CFTC appealed naming Geldermann as the only appellee. The Board of Trade concurred with the District Court's decision and chose not to appeal. However, the Exchange intervened as an appellee pursuant to Rule 24 of the Federal Rules of Civil Procedure, 28 U.S.C. Rule 24 (F.R.Civ.P.), because of its interest as an original party to the underlying action and due to the fact that virtually all of its members share Geldermann's interest in objecting to compulsory arbitration through the imposition of CFTC Regulation 7.201. FSI was not a party to the action before the Seventh Circuit.

The Seventh Circuit addressed the dispute as whether the CEA compels the Commission to promulgate rules requiring commodity exchange members to submit to customer-initiated arbitration, and, if so, whether such a mandate violates Article III of the United States Constitution or the Seventh Amendment (App. p. 1, *infra*).

On the first point, the Seventh Circuit stated that §5a(11) of the Act requires Exchange members to submit to arbitration by virtue of CFTC Regulation 7.201, and that con-

siderable weight should be accorded to the Commission's construction of the Act which it is entrusted to administer (App. p. 9, *infra*). The Seventh Circuit premised its position by finding that Congress twice amended the CEA since the Commission's promulgation of Regulation 7.201 without overturning the CFTC, and that in 1978 Congress noted that it was not altering the Commission's interpretation that exchange members submit to customer arbitration (App. p. 10, *infra*).

The Petitioners asserted below that §5a(11) of the CEA, CFTC Regulation 7.201 and Board of Trade Rule 620.01(B) all violate Article III of the U.S. Constitution because Geldermann is forced to submit to the resolution of common law customer claims against it without the tenure and salary protections accorded to judges under Article III. The Seventh Circuit dismissed this contention by finding that Geldermann waived its right to an Article III forum by consenting to submit to arbitration (App. p. 12, *infra*). Geldermann was deemed to have waived its constitutional guarantee because it voluntarily became a member of the Board of Trade, despite the virtual economic necessity of such membership for a firm like Geldermann, thereby agreeing to be bound by the compulsory arbitration provisions of Exchange Rule 620.01(B) (App. pp. 12-15, *infra*).

The Seventh Circuit also addressed the constitutional checks and balances embodied in Article III which may be implicated to overrule the consent of a party (App. p. 21, *infra*). In this regard, the Court found that mandatory arbitration did not threaten the structural integrity of the courts or the separation of powers between the branches of government because the Congressional scheme of allowing commodity customers the option of electing arbitration is not an undue intrusion on the province of the judiciary (App. pp. 22-25, *infra*).

Finally, the Seventh Circuit determined that because Geldermann was not entitled to an Article III forum for the adjudication of its claims, the Seventh Amendment right to trial by jury was not implicated (App. p. 26, *infra*). Accordingly, the Seventh Circuit reversed the District Court's decision enjoining enforcement of CFTC Regulation 7.201 (App. pp. 2 and 26, *infra*).

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS ERRED IN RELYING ON EXPRESS LEGISLATIVE INACTION AS EVIDENCE OF CONGRESSIONAL INTENT TO REQUIRE COMPULSORY ARBITRATION OF COMMON LAW CLAIMS WHEN CONGRESS WAS FULLY AWARE THAT MANDATORY ARBITRATION HAD BEEN DECLARED UNCONSTITUTIONAL AND EXPRESSLY CHOSE NOT TO ALTER THAT JUDICIAL DETERMINATION.

In finding that the CEA compels Geldermann and other commodity exchange members to submit to customer-initiated arbitration, the Court of Appeals claims that the District Court erred by failing to accept the Commission's interpretation of §5a(11) as articulated in Regulation 7.201. Specifically, the Seventh Circuit stated that the District Court erred in failing to give sufficient weight to *Chevron U.S.A., Inc. v. Natural Resources Council, Inc.*, 467 U.S. 837 (1984), and this Court's statement "that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." 467 U.S. at 844 (App. p. 9, *infra*). The District Court also is criticized for not correctly analyzing the legislative history of the CEA in reaching its decision (App.

p. 10, *infra*). The Seventh Circuit found the legislative history to support the Commission's interpretation of §5a(11). In reaching this conclusion, the Court of Appeals cites to the fact that Congress has twice amended the CEA since the enactment of Regulation 7.201 without overturning the Commission (App. p. 10, *infra*). The Seventh Circuit's construction is, however, fatally flawed.

Initially, whatever degree of weight should be given an agency's statutory interpretation, the agency cannot simply abrogate constitutionally guaranteed rights especially where, as here, there is no clear Congressional intent that the agency do so. The *Chevron* decision itself states that:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the Court determines Congress has not directly addressed the precise question at issue . . . the question for the Court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 842.

Here, as demonstrated, *infra*, Congressional intent was expressly *neutral* in the face of a judicial determination that the CFTC's imposition of compulsory customer arbitration is unconstitutional. Therefore, deference to an agency interpretation becomes irrelevant, and the relevant judicial inquiry becomes whether the agency action is a permissible construction. This was precisely the inquiry of the District Court which held Regulation 7.201 unconstitutional.

The Court of Appeals clearly erred when it interpreted Congress' inaction with respect to §5a(11) as support for Regulation 7.201 and the CFTC's interpretation. In amending the CEA during the 1982 re-authorization of the Commission, Congress was made fully aware of the District Court's decision in *CBT v. CFTC* that Regulation 7.201 is unconstitutional (App. p. 6, *infra*). The Seventh Circuit mistakenly focuses upon the limited Congressional statement that the 1982 amendments "[d]o not affect . . . the Commission's understanding that exchange members must participate in arbitration proceedings which the customer has elected to pursue." H.R. Rep. No. 565, 97th Cong., 2d Sess. 56 (1982). However, reliance upon this statement in isolation from the rest of the record is totally misleading.

Clearly, Congress' knowledge of the District Court's decision, coupled with its inaction despite the knowledge of that decision, cannot be inferred as support for the Commission's construction of §5a(11). To the contrary, it must be construed as evidence that Congress was satisfied with the District Court's determination as to the unconstitutionality of Regulation 7.201 and chose not to disturb that ruling. Had Congress felt otherwise (as the Seventh Circuit concluded), Congress easily could have removed any doubt by expressly amending §5a(11) to specifically require that all customer claims must be arbitrated. They explicitly declined to do so.

Despite acknowledging the "Commission's understanding", it remains undisputed that Congress took no action either to remedy the District Court's ruling or to validate the CFTC's interpretation by amending §5a(11). Such inaction cannot now be interpreted by the Seventh Circuit as Congress' concurrence with Commission Regulation 7.201. Congress' inaction merely indicates that it was cognizant of the dispute between the CFTC and the Ex-

change and the judicial determination that the agency's position is invalid, and that it chose to take no position with respect to the Commission's interpretation and the judicial rejection of that interpretation. Thus, the legislative history shows that Congress expressly approved the status quo, which was the unconstitutionality of Regulation 7.201 as declared by the District Court in *CBT v. CFTC*.

The Court of Appeals also points out that Congress amended the CEA in the Futures Trading Act of 1986 without altering the CFTC's construction of §5a(11) (App. p. 10, n. 7, *infra*). Congressional inaction here does not equate to approval of CFTC Regulation 7.201; instead it again indicates Congress' refusal to alter the status quo. The situation in 1986 was that the Court of Appeals had reversed the district court's decision in *CBT v. CFTC*, but only on ripeness grounds, and with favorable comment as to the questionable constitutionality of Regulation 7.201 (App. p. 2, *infra*). Moreover, Congress had before it in the 1986 reauthorization record the report of the National Futures Association ("NFA"), the industry wide self-regulatory body it created in 1982. NFA has a nationwide mandatory arbitration program available to commodity futures customers. National Futures Association Manual, Code of Arbitration, §6017.1(a). Thus, the only logical inference is that Congress felt the combination of NFA arbitration and CFTC reparations actions negated any necessity to overrule the judicial determination that compulsory customer arbitration at the Board of Trade is unconstitutional.

It is obvious that Congress said and did nothing to validate or support the CFTC imposition of compulsory customer arbitration. This inaction can only be inferred as an express Congressional intent to remain neutral in the battle over the constitutionality of Regulation 7.201 and accept the judicial determination that mandatory customer

arbitration is unconstitutional. If Congress supported the Commission's interpretation, it would have expressly made this known simply by amending §5a(11) in plain english to comport with Regulation 7.201. Clearly, the Seventh Circuit's deference to the Commission's interpretation of §5a(11) and its reliance on the legislative history to support this interpretation is misplaced and erroneous.

II.

ABSENT GELDERMANN'S CLEAR, KNOWING AND INTENTIONAL WAIVER OF ITS CONSTITUTIONAL RIGHT TO HAVE COMMON LAW DISPUTES HEARD BEFORE AN ARTICLE III FORUM, THE SEVENTH CIRCUIT IMPROPERLY INFERRED A WAIVER OF THIS RIGHT MERELY BECAUSE GELDERMANN MAINTAINED ITS MEMBERSHIP AT THE BOARD OF TRADE.

The Seventh Circuit determined that Geldermann waived its constitutional right to have FSI's common law claims adjudicated before a jury in an Article III court. This decision is not only contrary to the largely undisputed facts of the case, but fails to conform to the law articulated by this Court.

Neither the Board of Trade nor Geldermann have ever consented to the constitutionality of the mandatory arbitration provision at issue in this case. The Board of Trade's unceasing opposition to the mandatory arbitration provision is evidenced by the following footnote in its rulebook to Regulation 620.01(B):

> The legality of Rule 7.201, and thus the obligation of Board of Trade members to arbitrate customer's claims and grievances, has been the subject of litigation between the Board of Trade and the CFTC. In 1982, the United States District Court for the Northern District of Illinois declared the Rule invalid, holding that CFTC Rule 7.201 is an unconstitutional denial of the right to a jury trial. However, on April 5,

> 1983, the Seventh Circuit Court of Appeals held that the case was not yet "ripe" for adjudication. While the Court did not rule on the merits, the Court went on to say: "Moreover, the Board need not flout the rule in order to challenge its validity. A member or employee ordered by the Board or the Commission to arbitrate under Rule 7.201 could simply bring a suit to enjoin arbitration or to enjoin enforcement of an arbitration award against him on the ground that the Commission's rule requiring arbitration is invalid.

Notwithstanding the clear intent of both the Exchange and Geldermann not to consent to the constitutionality of CFTC Regulation 7.201, the Seventh Circuit concluded that Geldermann waived its personal guarantees under Article III and reversed the decision of the District Court. In doing so, the court examined a line of cases which define narrow exceptions to this fundamental right and incorrectly applied them in the instant case.

Relying on *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), the Seventh Circuit erroneously concluded that voluntary membership at the Board of Trade divested Geldermann of its constitutional right to an Article III forum. *Thomas* involved a mandatory arbitration scheme designated by the Environmental Protection Agency ("EPA") to resolve compensation disputes concerning data submitted to the EPA under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"). The narrow issue in *Thomas* was "whether Article III of the Constitution prohibits Congress from selecting binding arbitration . . . as the mechanism for resolving disputes among participants in FIFRA's pesticide scheme." *Id.* at 572. The Court found that under the extremely narrow circumstances presented in *Thomas*, and the highly involved administrative proceedings in that industry, binding arbitration was appropriate. Furthermore, the *Thomas* registrants explicitly consented to have their rights determined by arbitration. *Id.* at 585.

Unlike *Thomas*, Geldermann never consented to mandatory arbitration. To the contrary, the firm was aware of and relied upon a footnote in the Board of Trade rulebook which apprised the Exchange membership that the Northern District of Illinois had declared Regulation 7.201 unconstitutional. The notice in the rulebook further advised Geldermann and other Exchange members that the Seventh Circuit subsequently determined that the issue before the District Court was not ripe for adjudication, but that a member ordered to arbitrate pursuant to Rule 620.01(B) could again challenge the validity of Regulation 7.201. In reliance upon the prior judicial rulings as noted in Exchange rules, Geldermann did challenge the constitutionality of Regulation 7.201 after it was forced to arbitrate a customer complaint based upon common law claims.

Geldermann's reliance on the District Court and Seventh Circuit's decisions in *CBT v. CFTC*, and the footnote to Exchange Rule 620.01(B), simply cannot be construed as a knowing, intentional and voluntary waiver of its Article III rights. First, the only judicial determination on the merits of the CFTC-imposed regulation declared the mandatory arbitration scheme unconstitutional. Second, Geldermann reasonably relied on the Court of Appeals' decision and the Exchange rulebook for extending the opportunity to litigate this issue. Given these circumstances, the Seventh Circuit clearly misapplied *Thomas* to this case.

Thomas is also distinguishable because the plaintiff there did not raise the Seventh Amendment argument of a right to trial by jury from which a waiver could be interpreted, nor did this Court base its decision on plaintiff's waiver of an Article III right by registering under FIFRA. Moreover, the case now before the Court is

based on a common law dispute, not a statutorily created right as found in *Thomas*.

Furthermore, the Seventh Circuit held that by its continued voluntary association with the Board of Trade, Geldermann consented to the resolution of claims against it in a customer-initiated arbitration proceeding. The Court made the astounding suggestion that Geldermann could have resigned its membership at the Exchange to preserve its Article III right because such action "is not such an extreme order to retain a constitutional right." (App. p. 18, n. 9, *infra*).

The Court's rationale would compel Geldermann to surrender a substantial part of its livelihood in order to preserve a constitutional claim. This dilemma was clearly understood by the District Court in light of its appraisal of an affidavit from Kevin Mack, President of Geldermann. Mr. Mack stated that on the basis of customer balances, Geldermann reputedly is the largest U.S. commodity brokerage firm. Most of this business derives from large commercial accounts which trade on the Exchange through Geldermann because of the benefits conferred in being a member of the Board of Trade. These benefits are an active presence on the Exchange floor and in the trading pits. Access to the trading floor and pits is an invaluable, exclusive source of market information and its integration in the price discovery auction process. A floor presence also is essential in order for Geldermann to meet its customers' demands for rapid order execution where large positions in volatile markets pose enormous financial risk. Without its Board of Trade membership, Geldermann simply could not execute buy and sell orders with the speed and price advantage necessary to retain its customer base in an extremely competitive industry.

The Seventh Circuit clearly erred in conditioning the exercise of constitutional rights on the sacrifice of one's economic viability. Taken to its legal conclusion, no right guaranteed under the constitution could be protected from infringement unless the injured party would be willing to sacrifice its livelihood. For example: if a state were to require that any attorney/client fee dispute must be submitted to arbitration, the Seventh Circuit's logic would dictate that an attorney's only resource would be to surrender his or her license to practice law; any challenge would be deemed to have been "waived" by continuing to practice law after the unconstitutional requirement had been instituted. Such a result is incredible and incorrect. Yet this is the choice given to Geldermann by the Court of Appeals. Geldermann's economic necessity in remaining a Board of Trade member simply cannot be construed as the intentional, knowing or voluntary waiver of Article III rights required by this Court.

The Seventh Circuit also determined that Geldermann waived its Article III rights and consented to the application of Regulation 7.201 merely because it had previously consented to arbitrate a claim at the Board of Trade (App. p. 19, *infra*). In support of this position the Seventh Circuit relied upon *Commodity Futures Trading Commission v. Schor, et al.*, ____ U.S. ____, 106 S. Ct. 3245 (1986). In *Schor*, respondents filed separate reparations complaints with the CFTC against petitioner (a commodity futures broker). The broker thereafter filed a diversity action in federal district court against the respondents. Respondents then moved to dismiss the action on the ground that the reparations proceeding would resolve all rights of the parties. *Id.* at 3251. The CFTC found against the respondent and in favor of the broker; the Commission also granted the broker the damages alleged in the counterclaim initially filed in federal court. Only after

respondents lost at the Commission (and after agreeing that all rights would be resolved before the CFTC) did the respondents seek to challenge the Commission's authority.

Schor is easily distinguished from the instant case. The first arbitration filed at the Exchange came about when FSI asserted a claim against Geldermann for its failure to fill a purchase order in April, 1985. Geldermann agreed to arbitrate the claim at the Exchange and Geldermann was ordered to pay $54,718 to FSI. Thereafter, Geldermann requested that FSI terminate its business relationship with the firm and requested that FSI make immediate arrangements to transfer all open positions to another clearing firm. In doing so, another dispute arose which is the foundation of this case. At no time did Geldermann agree to arbitrate the second claim before an Exchange arbitration panel. Merely because the firm elected to arbitrate one claim does not mean that it agreed to submit all subsequent disputes for resolution before the same panel. Moreover, *Schor* was a CFTC reparations proceeding which must be premised upon a violation of the CEA. 7 U.S.C. §18. Geldermann's second dispute with FSI is clearly a simple case of contract law and monetary damages; common law issues not governed by *Schor*.

III.

THE COURT OF APPEALS INCORRECTLY DENIED GELDERMANN'S SEVENTH AMENDMENT RIGHT TO A TRIAL BY JURY OF COMMON LAW CLAIMS.

The Board of Trade and Geldermann have steadfastly maintained that the claims asserted against Geldermann are clearly subject to the Seventh Amendment guarantee of a trial by jury. It is elementary that the Constitution guarantees the right to trial by jury "in suits at common

law." U.S. Const., Amend. VII. Furthermore, where the claim or right asserted entitles one to a money judgment customarily granted by a court of law, this is the type of relief to which a trial by jury applies. *See, Dairy Queen v. Wood*, 369 U.S. 469, 477-8 (1962). Because the claims asserted against Geldermann, sounding in debt, contract and conversion, are of a kind traditionally tried at common law for money damages, compelling Geldermann to arbitrate such claims would blatantly violate its Seventh Amendment right to a jury. *See, Ross v. Bernhard*, 396 U.S. 531 (1970).

As the District Court noted, when the Constitutional right to jury trial is waived, it can only be done knowingly, intentionally and voluntarily. *Leasing Service Corp. v. Crane, et al.*, Nos. 85-1679, 85-1755, slip op. (4th Cir. 1986); *National Equipment Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977); *Rocco Ferrera & Co., Inc. v. G.H.A. Lockjoint, Inc.*, No. 85-7186, slip op. (N.D. Ill. October 11, 1985). Also, courts are to construe narrowly a waiver of Seventh Amendment rights and are to indulge in every reasonable presumption against waiver. *See also, Beacon Theater, Inc. v. Westover*, 359 U.S. 512 (1959); *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937).

In reaching its decision, the District Court referred to the footnote to Rule 620.01(B) in holding that:

> . . . while the disclaimer notified Geldermann of the mandatory arbitration scheme in Regulation 7.201 and CBT Rule 620.01(B), the disclaimer did not make clear that, if Geldermann accepted CBT membership, Geldermann would waive its Seventh Amendment rights. Rather, the disclaimer suggested that a court would again invalidate the regulation when a member challenged it in the proper procedure. Geldermann did not, in these circumstances, knowingly and intentionally waive its Seventh Amendment right (App. p. 34, *infra*).

Although the Seventh Court reversed the District Court's decision, it did not directly address this issue. Rather, the Appellate Court found that because Geldermann had waived its right to an Article III forum the Seventh Amendment was not implicated (App. p. 26, *infra*). As articulated above, however, the Seventh Circuit's decision is clearly erroneous in finding a waiver by Geldermann of its Article III rights. Therefore, the Seventh Amendment is acutely implicated to ensure Geldermann's constitutional protections by means of a jury trial on FSI's common law claims.

IV.

THE COURT OF APPEALS ERRED IN UPHOLDING CONGRESSIONAL AUTHORIZATION FOR THE ADJUDICATION OF ARTICLE III MATTERS IN A NON-ARTICLE III FORUM, THEREBY TRANSGRESSING THE INSTITUTIONAL INTEGRITY OF THE COURTS AND THE SEPARATION OF POWERS BETWEEN THE BRANCHES OF GOVERNMENT.

The purpose of Article III of the United States Constitution is to ensure that the judicial power should be entrusted only to those judges whose impartiality and freedom from coercion are ensured by life tenure, subject only to impeachment, and by irreducible compensation. *Wimmer v. Cook*, 774 F.2d 68 (4th Cir. 1985).

Although constitutional guarantees may be waived, Article III implicates the separation of powers between the branches of government, therefore, notions of consent and waiver are not controlling because the guarantees of Article III serve institutional interests that the parties cannot be expected to protect (App. p. 22, *infra*, citing *Commodity Futures Trading Commission v. Schor, et al.*, ____ U.S. ____, 106 S. Ct. 3245 (1986)). However, this Court "has long recognized that Congress is not barred from acting

pursuant to its powers under Article I to vest decision making authority in tribunals that lack the attributes of Article III courts." *Thomas v. Union Carbide Agricultural Products, Co.*, 473 U.S. 568, 583 (1985). Although the CFTC has sought to rely on this language in arguing for the constitutionality of Regulation 7.201, *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), stands for the proposition that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review. 458 U.S. at 84.

Therefore, a significant issue here concerns the adjudication of "public" rights versus "private" rights, as articulated in *Thomas* and *Northern Pipeline*, and the structural protections of Article III. Clearly, the Seventh Circuit misconstrued Geldermann's rights in the instant case and dealt a blow to the institutional integrity embodied in Article III.

"Public" rights have been defined as those "matters arising between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." *Northern Pipeline*, 458 U.S. at 67-68 (1982), citing *Crowell v. Benson*, 285 U.S. 22, 50 (1932). "Private" rights consist of "the liability of one individual to another under the law as defined." 458 U.S. at 69-70.

The Court of Appeals has glossed over the distinction between the resolution of disputes involving individuals or entities subject to an agency's regulatory scheme, in the context of administrative proceedings which arguably do involve the adjudication of "public" rights and to which the right to a jury trial does not attach, and the situation presented here of compelling only one of two parties

to arbitrate, thereby denying one party of its constitutional rights in connection with resolving traditional common law claims ("private" rights). The *Thomas* decision clearly emphasizes that where private rights are involved, those rights should be protected from encroachment by the Government. *Thomas*, 473 U.S. at 583, citing *Northern Pipeline*, 458 U.S. at 70-71 and n. 25.

In *Thomas*, FIFRA created arbitration where none had existed before, narrowly limited to a specific type of dispute between individuals or entities, all of which were subject to the EPA's regulatory structure. In contrast, §5a(11) does not create a new right but simply establishes a forum for resolving the common law claims asserted against Geldermann. In addition, arbitration or similar procedures for resolving customer disputes were in existence at many exchanges long before the CFTC was formed.* Although exchange arbitration involves futures transactions which may be subject to CFTC regulation, the CFTC does not participate in any way in an actual arbitration between the two private parties. Moreover, an arbitration tribunal does not make formal findings of violative conduct, but rather renders awards of monetary damages just as in civil litigation subject to an Article III forum.

The Court of Appeals also incorrectly cites to *Schor* in support of its argument that common law claims (private rights) may be adjudicated before a non-Article III tribunal. In *Schor*, this Court found that the Commission's jurisdiction over common law counterclaims, asserted in

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* Hearings before the House Committee on Agriculture on Review of Commodity Exchange Act and Discussion of Possible Changes, 93rd Cong., 1st Sess., at 97 (Comments of the Board of Trade of Kansas City), at 118 (Comments of the Commodity Exchange, Inc.), at 131 (Comments of the Chicago Board of Trade), at 138 (Comments of the New York Cotton Exchange), at 165 (Comments of the New York Mercantile Exchange).

a CFTC reparations proceeding, did not violate Article III. But *Schor* is analogous to *Thomas* and easily distinguishable from the instant case because in contrast to common law claims which are often asserted in a CBOT arbitration proceeding, reparations actions under Section 14 of the Act, 7 U.S.C. §18, must involve a violation of the CEA or Commission regulations. In fact, Section 14 of the CEA specifically mandates that a complaint in reparations must allege a violation of the Act. Furthermore, Congress unequivocally prescribed that reparations is compulsory for CFTC registrants, whereas Congress did not articulate the same mandate for commodity exchange members subject to customer-initiated claims.

It must be emphasized that the structural protections of Article III are severely threatened by an arbitration scheme which precludes Geldermann and other Exchange members from even having the option to forego an Article III forum. Removing a party's discretion to consent to CFTC arbitration, absent a knowing or voluntary waiver of Article III rights, is an encroachment upon the separation of government powers which should not be tolerated.

In addition, the Board of Trade strenuously objects to the Court of Appeals' cavalier assertion that because Geldermann is not entitled to an Article III forum, the Seventh Amendment is not implicated. Obviously, that argument begs the issue of whether the CFTC's imposition of mandatory arbitration is permissible and proper. Exchange members' disputes with customers frequently involve simple common law actions for monetary damages with no dependence upon the federal scheme of regulation of futures transactions.* In these instances, Exchange

* For example, customer actions against commodity brokers for breach of contract have been specifically recognized as "suits at

(Footnote continued on following page)

members must be allowed to exercise their Seventh Amendment rights and have such claims tried to a jury if they so choose.

Section 5a(11) of the Act was designed to offer an efficient and expeditious alternative to court action or statutory recovery procedures for both customers and the commodity firms with which they deal. H.R. Rep. No. 93-975, 93rd Cong., 2d Sess. (1974). Obviously, arbitration need not be a mandatory procedure in order to be a useful dispute resolution process for commodity customers. More often than not, Exchange members voluntarily agree to arbitration because of its traditional advantages, such as the speedy resolution of disputes by experts in the field at significant savings. The Board of Trade, however, strongly opposes mandatory arbitration when a member, like Geldermann, asserts its constitutional rights.

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* *continued*

common law" entitling the parties to a jury trial. *Arkoosh v. Dean Witter & Co., Inc.*, 415 F. Supp. 535 (D. Neb. 1976). Other claims that CBOT members are likely to be forced to arbitrate under the CFTC's regulation are also legal in nature, involving such traditional common law issues as fraud, *Halladay v. Verschoor*, 381 F.2d 100, 108-09 (8th Cir. 1967); negligence, *Ransom v. Staso Milling Co.*, 2 F.R.D. 128, 131 (D. Vt. 1941); breach of fiduciary duty, *Dixon v. Northwestern Nat'l. Bank of Minneapolis*, 297 F. Supp. 485 (D. Minn. 1969); and violation of an agency duty, *Bradshaw v. Thompson*, 454 F.2d 75, 79 (6th Cir. 1972), *cert. denied*, 409 U.S. 878 (1972).

CONCLUSION

This petition raises significant and compelling reasons for this Court to exercise its discretion to review the Court of Appeals' decision. Therefore, the Board of Trade of the City of Chicago prays that its petition for a writ of certiorari be granted.

Respectfully submitted,

SCOTT E. EARLY *
PAMELA KLEIN-KURLAND
JOHN C. LEGUTKI
WILLIAM CULLEN
141 West Jackson Boulevard
Chicago, Illinois 60604
(312) 435-3500

Counsel for Petitioner
Board of Trade
of the City of Chicago

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* Counsel of Record